

Pursuant to Ind. Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

ROBERT D. KING, JR.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DARRYL L. ABRON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0607-CR-388
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Louis Rosenberg, Judge
Cause No. 49G99-0406-FD-101271

March 27, 20007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Darryl Abron appeals his conviction for theft, a Class D felony. On appeal, Abron¹ raises the single issue of whether the trial court properly admitted videotape evidence. We affirm, concluding that the trial court did not abuse its discretion in admitting the videotape.

Facts and Procedural History

On May 31, 2004, Abron entered an AJ Wright department store in Indianapolis. J.T. Hull was working at AJ Wright that day in his capacity as a loss prevention officer. While in the loss prevention office Hull received a phone call, after which he began observing the store's camera system in search of a man later identified as Abron. After locating Abron on the store's camera system, Hull and AJ Wright's store detective, Patricia MeHaffey, went to the store floor to observe Abron. MeHaffey observed Abron and Latonya Williams-Taylor, a co-defendant at trial,² remove security tags from store merchandise and place the merchandise in AJ Wright bags. Abron then left the store without paying for the merchandise. MeHaffey and Hull left the store with the intention of apprehending Abron. When they approached Abron in the parking lot and identified themselves, Abron dropped the merchandise and fled. Hull saw Indianapolis Police Officer Michael Horn in another part of the parking lot, and summoned him. Hull told Officer Horn that an individual had just

¹ In its brief, the State refers to Abron as "Defendant." We remind counsel of Indiana Appellate Rule 22 (D), which states "References to parties by such designations as 'appellant' and 'appellee' shall be avoided. Instead, parties shall be referred to by their names, or by descriptive terms such as 'the employee,' 'the injured person,' 'the taxpayer,' or 'the school.'"

² Williams-Taylor was charged with conspiracy to commit theft, a Class D felony, and attempted theft, a Class D felony. The jury found Williams-Taylor not guilty of attempted theft, and was unable to reach a verdict on the conspiracy charge. The trial court declared a mistrial on this conspiracy count.

stolen some items from AJ Wright, and provided Officer Horn with a physical description of Abron. Officer Horn subsequently located Abron nearby. Abron told Officer Horn, “Look, I’ve just got a couple of shirts, let me go back and pay for them, that’s all I want to do.” Transcript at 164. Abron was arrested and subsequently charged with theft.

At Abron’s trial, the State introduced the testimony of Hull, MeHaffey, and Officer Horn. The State also introduced a video surveillance tape of the incident. This videotape was not an original, but was a version that Hull had prepared for trial. AJ Wright uses a “multiplexer system,” which is a system that allows for nine different camera angles to be recorded on a single tape. The recordings are not in real time, but instead, every second on the tape represents three seconds of real time. When editing the tape, Hull removed everything from the tape that did not relate to Abron and Williams-Taylor. Hull also included some of Abron’s recorded actions from more than one angle. As a result, the tape is not merely a continuous flow of events, but at one point stops and replays Abron’s actions from a different angle. Abron objected to the admission of this videotape at all relevant times. After the State rested, Abron testified in his own defense, denying that he stole items or that he made any statements to Officer Horn. The jury found Abron guilty of theft, and the trial court entered a judgment of conviction. Abron now appeals.

Discussion and Decision

I. Standard of Review

We review a trial court's decision to admit evidence for abuse of discretion. Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), trans. denied, cert. denied, 126 S.Ct. 1058 (2006). We will find that a trial court has abused its discretion when its decision is "clearly against the logic and effect of the facts and circumstances before it." Id. Even when we find that a trial court has abused its discretion by admitting evidence, we will not reverse unless the defendant's substantial rights have been affected. Ind. Evidence Rule 103(a); Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005), cert. denied, 126 S.Ct. 2936 (2006). In determining whether or not a party's substantial rights were affected by the erroneous admission of evidence, we "assess the probable impact of that evidence upon the jury." Corbett v. State, 764 N.E.2d 622, 628 (Ind. 2002).

II. Admission of the Videotape

On appeal, Abron primarily argues that the trial court erroneously admitted the videotape because it violated the rule of completeness. In his brief, Abron also states that he is requesting "a new trial due to the admission of prejudicial evidence, unreliable and incomplete evidence." Appellant's Brief at 9. However, Abron has not provided citations to authorities to support his argument that the evidence should have been excluded because of its prejudicial nature or its unreliability. See Ind. Appellate Rule 46(A)(8)(a) ("Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . ."); Davis v. State, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005), trans. denied ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority . . ."). However, given our

preference for deciding issues on their merits instead of invoking waiver, we will address Abron's arguments relating to unfair prejudice and unreliability. See Collins v. State, 639 N.E.2d 653, 655 n.3 (Ind. Ct. App. 1994), trans. denied (although party cited no authority in support of his argument, court addressed issue based on "strong preference to decide issues on their merits").

A. Rule of Completeness

Abron argues that the trial court erroneously admitted the videotape because it was not "a complete recording of what the nine cameras saw," and therefore, its admission violated the rule of completeness. The source for this rule comes from Indiana Evidence Rule 106, which states: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it." This rule applies to videotapes. DesJardins v. State, 759 N.E.2d 1036, 1038 (Ind. 2001).

Although Abron could theoretically have a valid argument that the trial court would have erroneously denied Abron's motion to introduce other parts of the videotape relevant to his defense,³ Abron's argument that the trial court should have excluded the videotape under

³ The rule of completeness does not require that an entire recording be admitted merely because a part thereof has been admitted. "[A] court need not admit the remainder of the [recording], or portions thereof, that are neither explanatory nor relevant to the portions already introduced." Lieberenz v. State, 717 N.E.2d 1242, 1248 (Ind. Ct. App. 1999), trans. denied. The trial court would have been required to admit the entire videotape only upon Abron's showing that the entire videotape was relevant and that its admission was necessary to explain or place into context the part already introduced. U.S. v. Simms, 385 F.3d 1347, 1359 (11th Cir. 2004), cert. denied, 544 U.S. 988 (2005) (applying Fed. Rule Evid. 106, which is textually indistinguishable from Indiana's counterpart). We express no opinion as to whether Abron would have been

the rule of completeness is without merit.

The rule of completeness is not a rule under which a party may seek to exclude evidence, but is instead a rule under which a party may seek to introduce additional evidence.

The text of Indiana Evidence Rule 106 in no way refers to the exclusion of evidence, and research has disclosed no cases under this rule or its federal counterpart⁴ indicating that exclusion is a remedy under this rule. “This rule ‘is designed to avoid misleading impressions caused by taking a statement out of its proper context or otherwise conveying a distorted picture by the introduction of only selective parts.’” Atwell v. State, 738 N.E.2d 332, 335 (Ind. Ct. App. 2000), trans. denied, cert. denied, 534 U.S. 876 (2001) (quoting Lieberenz, 717 N.E.2d at 1248). The rule does not operate to exclude relevant evidence that may be misleading or incomplete; instead, “it operates to ensure fairness where a misunderstanding or distortion created by the other party can only be averted by the introduction of the full [document, recording, or videotape].” United States v. Ramos-Caraballo, 375 F.3d 797, 803 (8th Cir. 2004) (discussing Federal Rule of Evidence 106) (internal quotation omitted).

Because the doctrine of completeness does not operate to exclude otherwise admissible evidence, the trial court could not have abused its discretion in admitting the

able to make such a showing, as he has presented no such argument on appeal, and apparently made no motion to introduce the remainder of the videotape at trial.

⁴ Federal Rule of Evidence 106 states: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

videotape based on any alleged violation of this doctrine.

B. Probative Value Versus Unfair Prejudice

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” Ind. Evid. Rule 403.

Although Abron does not explicitly state how any unfair prejudice he suffered substantially outweighs the videotape’s probative value, at various points throughout his brief, he complains that the videotape did not show Abron entering the store, and that the videotape replays some of Abron’s actions from a different angle. Although this videotape evidence was clearly prejudicial to Abron, we fail to see how this prejudice was unfair. See Walker v. Cuppett, 808 N.E.2d 85, 101 (Ind. Ct. App. 2004) (noting that evidence should be excluded only if “its probative value is substantially outweighed by the danger of unfair prejudice, not simply prejudice to a party’s theory of the case”) (emphasis in original). The fact that Abron’s actions were shown from different camera angles hardly renders the evidence inadmissible as unfairly prejudicial or needlessly cumulative. Cf. Martin v. State, 784 N.E.2d 997, 1008 (Ind. Ct. App. 2003) (concluding any unfair prejudice flowing from admission of multiple photographs of victim did not outweigh probative value where photographs depicted victim’s injuries from different angles and distances and were therefore “not wholly cumulative”).

Hull and MeHaffey testified that they saw Abron remove security tags from

merchandise, place the merchandise in shopping bags, and leave the store without paying. Therefore, the videotape depicting these actions merely gave the jury a physical image of this testimony, and did not unfairly prejudice Abron. See United States v. Price, 418 F.3d 771, 782 (7th Cir. 2005) (where tape displayed activity to which witnesses had already testified, “fact that this [videotape] gave the jury a physical, as opposed to a mental, picture of that activity does not render the tape unduly prejudicial”) (applying Federal Rule of Evidence 403, which is textually indistinguishable from its Indiana counterpart).⁵

With regard to Abron’s complaint that the videotape did not show Abron enter the store, Abron had ample opportunity to cross-examine Hull as to the contents of the video and to point out the videotape’s deficiencies to the jury. The fact that the videotape does not depict all of Abron’s actions in or near the store does not render it unfairly prejudicial.

Any unfair prejudice that was suffered by Abron due to the admission of the videotape did not substantially outweigh the videotape’s probative value. The videotape has a high probative value, as it depicts Abron’s actions during the commission of the crime. Based on this high probative value and Abron’s failure to articulate how any prejudice suffered was unfair, we cannot say that the trial court abused its discretion in admitting the videotape.

C. Reliability

Abron also argues that the videotape should not have been admitted because it was unreliable evidence. Again, Abron does not articulate a comprehensive argument on this

⁵ Federal Rule of Evidence 403 states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

issue, but at various points throughout his brief complains that the videotape was not sequential, did not play in real time, and was edited by Hull to include only what he felt relevant.

Videotapes are admitted into evidence as substantive evidence under a “silent witness” theory,⁶ under which “videotapes may be admitted as substantive evidence, but ‘there must be a strong showing of [the videotape’s] authenticity and competency.’” McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005) (quoting Edwards, 762 N.E.2d at 136). Also, “when automatic cameras are involved, ‘there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and changing of custody of the film after its removal from the camera.’” Id. In addition, there must be a showing that the videotape has not been altered. See Edwards, 762 N.E.2d at 136; Bergner v. State, 397 N.E.2d 1012, 1017 (Ind. Ct. App. 1979) (discussing photographs).

The original recording from which Hull prepared the videotape for trial simultaneously displays nine screens depicting the images captured by the nine security cameras covering various parts of the store. The videotape introduced into evidence shows the images captured by one of these cameras at a time on a single, enlarged screen. Hull

⁶ As discussed above, much of what is displayed on the videotape is merely representative of what Hull and MeHaffey saw. These parts of the tape arguably constitute demonstrative evidence and could have been introduced independent of the “silent witness” theory. See Edwards v. State, 762 N.E.2d 128, 136-37 (Ind. Ct. App. 2002), trans. denied. However, the State seems to concede that it introduced this videotape as substantive evidence, see appellee’s brief at 3, and has made no argument that the tape should be considered demonstrative, and not substantive evidence. Also, at least some portions of the tape include images that Hull

selected the camera angle that depicted Abron, and switched to a different camera when Abron left the area of the store covered by one camera. Roughly halfway through the videotape, the recording stops, and Abron's actions in the store are replayed from a different camera angle.

Although the videotape introduced into evidence was not the original tape recorded at the store, neither was it an "altered" version as contemplated by Edwards or Bergner. The worries discussed in Bergner relating to altered photographs were of "misrepresentation or manufactured evidence which are possible through composite or retouched photographs," and of the introduction of "distortive and misrepresentative images." 397 N.E.2d at 1017. Thus, Bergner's directive that photographs not be altered contemplated actual changes to the images depicted in photographs. The videotape introduced in this case does not contain "altered" or "changed" images, but is merely a redacted version of the original that includes the relevant part of the original recording depicting Abron.

The videotape introduced into evidence is more properly considered a "duplicate" of the original recording. "A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording . . . or video tape or by other equivalent techniques which accurately reproduces the original." Ind. Evid. Rule 1001(4). The videotape introduced at trial was not "altered"; instead the videotape is more akin to an "electronic rerecording" of the original. See United States v. Beeler, 62 F.Supp.2d 136, 148

did not actually observe. See Tr. at 49. Therefore, we analyze the admission of the videotape assuming that it

(D.Me. 1999) (“[R]erecordings that are enhanced so that the images are clearer to depict are also ‘duplicates’ so long as the tapes accurately reproduce the original images on the tape.” (citing Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967), cert. denied, 390 U.S. 1005 (1968))); Bryant v. State, 810 So.2d 532, 537 (Fla. Ct. App. 2002) (enhanced excerpt of an original surveillance tape considered a duplicate).

“A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” Ind. Evid. Rule 1003. Abron has failed to raise a genuine question as to the authenticity of the original recording. His speculation that “a store owner could theoretically edit any tape to include those images that incriminate and exclude those that exculpate,” appellant’s br. at 9, is insufficient to raise such a question with regard to this specific videotape. See Levi v. State, 627 N.E.2d 1345, 1349 (Ind. Ct. App. 1994), trans. denied (defendant’s “bald speculation the original may have contained notations not depicted on the photocopy is insufficient to overcome the general rule that copies are admissible to the same extent as the original”).

Also, we conclude that it was not unfair to allow the State to introduce the videotape in lieu of the original surveillance tape. Hull testified and was cross-examined extensively regarding AJ Wright’s camera system and the procedure by which he edited the videotape. As discussed above, Abron has failed to explain how the admission of the tape caused him any unfair prejudice. Finally, we note that it would be impractical to admit the entire original

was introduced as substantive evidence under the “silent witness” theory.

tape, which contained roughly twenty-four hours of surveillance, and was in a format that would make the images more difficult to view.

We conclude that the videotape conformed to the requirements under the “silent witness” theory, and that the trial court did not abuse its discretion in admitting the videotape.

D. Harmless Error

Even if the videotape had been erroneously admitted, any error would have been harmless. We will conclude that errors in the admission of evidence are harmless “unless the errors affect the substantial rights of the party.” Wilson v. State, 770 N.E.2d 799, 802 (Ind. 2002). When making this determination, we consider “the probable impact of that evidence upon the jury.” Id. Where independent substantial evidence of the defendant’s guilt was introduced, we will conclude that the effect of any improperly admitted evidence was harmless. See Johnson v. State, 831 N.E.2d 163, 169 (Ind. Ct. App. 2005), trans. denied.

The majority of the information conveyed on the videotape is merely cumulative of Hull and MeHaffey’s testimony. See Crawford v. State, 770 N.E.2d 775, 781 (Ind. 2002) (erroneous admission of deceased husband’s diary relating marital problems was harmless where several witnesses testified as to problems in marriage). Even if the videotape had not been admitted, the State still presented significant and substantial evidence of Abron’s guilt. Hull and MeHaffey both testified that they witnessed Abron remove security tags from clothing and exit the store in possession of this clothing without paying. Officer Horn testified that upon his apprehension, Abron admitted to stealing the clothing. Because even without the videotape, the State introduced substantial evidence of Abron’s guilt, any error in

the videotape's admission would have been harmless.

Conclusion

We conclude the doctrine of completeness is not grounds for excluding evidence, any unfair prejudice suffered by Abron did not substantially outweigh the videotape's probative value, and the State sufficiently demonstrated the videotape's authenticity and competency so as to render its admission proper under the "silent witness" theory. Therefore, we conclude that the trial court did not abuse its discretion in admitting the videotape. Further, based on the substantial evidence introduced against Abron, any error in the tape's admission was harmless.

Affirmed.

BAKER, C.J. and DARDEN, J., concur.